

A Bill in the Supreme Court of the State of
Mississippi

BRIEF FOR PLAINTIFF IN ERROR

J. M. WILSON

DAY & HOLLISTER and others
vs.
The People of the State of Mississippi

WASHINGTON, D. C.,
GEO. BARN, PRINTER AND BINDER
1899

Supreme Court of the United States.

OCTOBER TERM, 1898.

DULUTH AND IRON RANGE RAIL-
ROAD COMPANY,

PLAINTIFF IN ERROR,

v.

JOSEPH ROY,

DEFENDANT IN ERROR.

No. 221.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The case at bar is a suit or action under the laws of the State of Minnesota, brought in the District Court, Eleventh Judicial District of said State, by Joseph Roy, the defendant in error here, against the plaintiff in error, the Duluth and Iron Range Railroad Company and John Megins, for the purpose of determining the adverse interests of said company and Megins, respectively, in and to certain real property described in the complaint, to wit,

the N.W. $\frac{1}{4}$ of section 3, township 61 N., range 15 W., the north half of said quarter section being claimed by said company and the south half thereof by said Megins, under mesne conveyances by the State of Minnesota, to which the premises had been patented by the United States. The plaintiff below, Roy, claimed the premises by virtue of an alleged settlement upon the same, and other acts done and performed in connection therewith under the homestead laws of the United States prior to said patent. During the progress of the suit in the trial court, Moses D. Kenyon, shown to have an undivided interest in the south half of said quarter section, was made a party defendant; trial, upon complaint, separate answers and replications under the practice of said State, was had before the judge of said district court without a jury; the said court filed its findings of facts and conclusions of law, and upon such findings and conclusions entered judgment for plaintiff; the defendants thereupon, respectively, appealed to the Supreme Court of the State of Minnesota; said last-mentioned court affirmed in all things the judgment below; thereupon the said Duluth and Iron Range Railroad Company, one of said defendants, sued out in this court its writ of error, and the case thus comes here for review.

The proceedings in the cause, in detail, as found in the transcript, were as follows:

1. Plaintiffs' complaint alleging ownership and possession of the premises; that defendants claimed an estate or interest therein adversely to plaintiff, and that suit is brought to determine such adverse claims. Demand is thereupon made that defendants set up their claim, and it is prayed that the court adjudge the plaintiff to be sole and absolute owner of said premises (Transcript, p. 6).

2. Answer of Duluth and Iron Range Railroad Company denying all averments not expressly admitted, and particularly that plaintiff is in possession of the premises, and alleging that said company is the owner in fee simple and entitled to possession of the land, and that plaintiff has no title to, interest in, or lien upon the same (page 7).

3. Answer of John Megins, alleging ownership in fee, and that the land was vacant and unoccupied at commencement of the suit (page 8).

4. Replies of plaintiff, being general denials of answers (pages 9, 10).

5. Amended replies of plaintiff, setting up in detail the facts upon which he relies to establish a valid right, claim or title under the homestead laws of the United States (pages 13 to 20).

6. Demurrer of defendant John Megins to new matter contained in amended reply (page 21).

7. Order overruling above demurrer (page 22).

8. Motion of plaintiff to make Moses D. Kenyon party defendant (pages 22 to 24).

9. Order making Moses D. Kenyon party defendant (page 25).

10. Answer of defendant Kenyon, alleging ownership in fee, and that the premises were vacant and unoccupied at commencement of suit (page 26).

11. Stipulation, plaintiff's amended replication to apply to last above answer (page 27).

12. Finding of facts and conclusions of law in trial court (pages 27 to 30).

13. Judgment-roll (page 31).

14. Appeal of Duluth and Iron Range Railroad Company (page 32).

15. Appeal of Megins and Kenyon (page 34).

16. Opinion, Start, C. J., Supreme Court, Minnesota, upon hearing of above appeals (pages 36 to 40).

17. Judgment, Supreme Court, in pursuance of above opinion (page 41).

18. Writ of error (page 2).

19. Assignments of error (page 43).

The finding of facts by the trial court were as follows (pages 27 to 30):

Finding of Facts.

"1st. That on or about the 26th day of May, A. D. 1883, the plaintiff was duly qualified to enter government lands under the homestead and pre-emption laws of the United States, and on the 9th day of June, 1888, he duly became a full naturalized citizen of the United States.

"2d. That on or about said May 26, 1883, the plaintiff did in good faith, and with the *bona fide* intention of acquiring title thereto, make settlement upon the following lands within St. Louis County, Minnesota, to wit: The northwest quarter (N. W. $\frac{1}{4}$) of section number three (3), in township sixty-one (61), north of range number fifteen (15), west of the fourth P. M.

"3d. That on the aforesaid date the plaintiff did, in good faith, and with the *bona fide* intention to acquire title to the aforesaid land, establish his residence upon and he has ever since continued to be and remain in the actual, exclusive and notorious possession thereof, during all of which time he has cultivated and improved the same and maintained his home upon said premises.

"4th. That said lands were at all times located within the district whereof the United States local land office was in the city of Duluth, Minnesota, and at the time when the plaintiff commenced his residence upon said land, the plat of the township in which the same was located had not been filed in said local land office, by reason of which the plaintiff was unable to file on said lands.

"5th. That subsequent to said settlement the said plat of the survey of said township was filed in said local land

office, and thereupon and subsequent thereto, to wit, on July 2d, 1883, the plaintiff went to said land office with the intention of entering the said land as a homestead under the laws of the United States, and he did then and there request the officers in said land office that he be allowed to make such entry; that said land officers did then and there inform him that a mistake had been made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests against said survey on file in the said office, which protests were sufficient to raise the question as to the accuracy of the same; that it was unnecessary for plaintiff to protest or object to said survey, or to file on said land, and they thereupon advised him to wait until the said protests which were there on file should be determined.

"6th. That plaintiff was a foreigner by birth and at said time did not understand the English language, and was not familiar nor acquainted with any of the laws, rules and regulations relating to the disposition of the public lands, but relied upon the representations so made by said officers, and acted upon the advice so given him, and returned to continue his occupancy and improvement of said lands.

"7th. That on the 5th day of August, 1884, the plaintiff discovered that said lands were claimed by the State of Minnesota as swamp lands, and thereupon on said date he duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making such entry. That at said time no adverse claim, other than the pretended claim of the State of Minnesota to said lands as swamp lands, had arisen or was made in reference thereto or filed in said land office.

"8th. That the said local land officers rejected plaintiff's said application to enter said lands, on the ground that the same inured to the State of Minnesota under the act of March 12th, 1860, and that his application to enter said lands was not made within three months after the filing of the township plat in said office.

"9th. That on the 6th day of August, 1884, the plain-

tiff duly filed in said local land office his affidavits of contest against said claim of the State of Minnesota to said land, duly corroborated by two witnesses, setting forth that said land was not swamp or overflowed land and unfit for cultivation, but that the same was all, with the exception of four or five acres in the northwest quarter (N.W. $\frac{1}{4}$) thereof, high, dry, and fit for cultivation.

"10th. That founded on said affidavits corroborated as aforesaid, on the 26th day of August, 1884, the plaintiff duly appealed from the rejection of his said application to enter said lands as a homestead by the said local land officers unto the Commissioner of the General Land Office. That said appeal with said affidavits was by said local land officers, on the 26th day of August, 1884, duly transmitted to the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884.

"11th. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said lands as a homestead, and his said contest against the claim of the State of Minnesota to said lands as swamp lands, were pending and undetermined in the General Land Office, the said lands were, through mistake and inadvertence, patented to the State of Minnesota.

"12th. That when the plaintiff commenced his residence on said lands, he erected thereon a good and substantial dwelling-house, and continued to reside therein until the summer of 1886, when the same was destroyed by fire. That he immediately thereafter erected and constructed another dwelling-house on said lands, in which ever since said time he has continued to reside and now resides.

"13th. That the plaintiff the first year he was on said land cleared and cultivated to crop about an acre and a half of said lands. That the next two succeeding years he cleared and cultivated, about four acres more of said land, and that each year since said time he has cultivated to crop all the land cleared by him as aforesaid.

"14th. That said lands were not at the time of the passage of the act of March 12th, 1860, nor were they

ever, nor are they now, swamp, wet, or overflowed, or unfit for cultivation; but on the contrary the same were, during all of said time, and now are, with the exception of four or five acres in the northwest corner thereof, high, dry, and fit for cultivation.

"15th. That on the 2d day of March, 1889, the State of Minnesota, by a deed of conveyance bearing date on that day, conveyed unto the St. Paul & Duluth Railroad Company the south one-half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

"16th. That on the 21st day of March, 1889, the said St. Paul & Duluth Railroad Company, by warranty deed, conveyed unto John Megins the said south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

"17th. That on the 23d of March, 1889, the said John Megins, by special warranty deed, conveyed unto Moses D. Kenyon an undivided one-half ($\frac{1}{2}$) of said south half (S. $\frac{1}{2}$) of the northwest quarter (N.W. $\frac{1}{4}$) of said section three (3).

"18th. That on the 25th day of March, 1891, the said Moses D. Kenyon and Ida H. Kenyon, his wife, by special warranty deed, conveyed unto defendant John Megins an undivided one-quarter ($\frac{1}{4}$) of the south half (S. $\frac{1}{2}$) of the northwest quarter (N.W. $\frac{1}{4}$) of said section three (3).

"19th. That on the 5th day of January, 1891, the State of Minnesota, by deed of conveyance of that date, conveyed unto the Duluth & Iron Range Railroad Company the north one-half of the northwest quarter (N. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$) of said section three (3).

"20th. That each and all of said defendants, when they respectively took the conveyance of said lands as afore-said, did so with notice of the plaintiff's right, claim and interest in and to said lands."

The assignments of error certified to this court, upon return to the writ of error, are as follows (page 44):

Assignments of Error.

"Now comes said plaintiff in error, on this 4th day of December, 1897, and says that the order and judgment

made in said cause affirming the judgment of the district court for the eleventh judicial district, State of Minnesota, is erroneous and against the just rights of plaintiff in error for the following reasons:

"1. The facts found do not support the conclusions of law.

"2. The court erred in finding, as a conclusion of law from the facts found, that the defendant in error is the equitable owner of the lands in question, to wit, the north half of the lands described in the complaint.

"3. The court erred in finding, as a conclusion of law from the facts found, that defendant in error was entitled to judgment declaring him to be the equitable owner of said lands.

"4. The court erred in affirming the judgment of the district court for the county of St. Louis for the reasons:

"*a.* That the legal title to the lands in question, the north half of the land described in the complaint, was vested in plaintiff in error, and there was no finding by said district court that there was any mistake of law or fraud on the part of the General Land Office of the United States or any officer of the United States.

"*b.* The finding by said district court that the patent to the State of Minnesota, through which plaintiff in error acquired legal title, was issued through a mistake and inadvertence does not constitute any ground for adjudging the defendant in error the equitable owner of the land and entitled to judgment.

"*c.* That defendant in error is not the real party in interest and never had any legal or equitable interest in the land, the United States being the only party which could question or attack the action of the officers of the General Land Office of the United States in issuing the patent to the State of Minnesota or invoke the action of the courts in determining its validity or to set it aside.'"

Upon the foregoing findings of facts and assignments of error, it is desired, on behalf of plaintiff in error, to submit the following propositions:

I. Equitable title necessary to sustain a suit like that

bar must be founded upon privity with the original legal title. It is almost universally based upon contract fully executed except the ministerial act of conveyance. The defendant in error, by his settlement and subsequent steps, as found, did not establish privity with the United States, the original owner of the legal title, or acquire any equitable interest in the land. He is not, therefore, in position to attack the legal title held by the plaintiff in error.

II. The legal title of the plaintiff in error had its origin in the patent of the United States to the State of Michigan. If the patent be taken as conveying lands enuring to the State under the swamp-land grant, then the patent itself inherently involves and conclusively presumes an adjudication by the Land Department of the fact that the premises are swamp in character. That finding of fact cannot be reviewed by the court in this proceeding. This being so, the legal title of plaintiff in error stands here unimpeached.

III. So far, however, as the findings are concerned, the patent may have been issued under any of the various acts of Congress granting lands to the State. In the absence of a specific finding that it was issued under the swamp-land act, the court will not conclude that the Land Department erred in its issue.

IV. The finding of the trial court that the patent to the State was issued "through mistake and inadvertence" cannot assist the defendant in error. If the mistake was one of fact, it is not here, in this proceeding, remediable. If mistake of law, it must appear wherein such mistake consists. Without such specific finding this court cannot determine whether error of law occurred. It will certainly not presume such an error from so general a finding.

V. If the finding of "mistake and inadvertence" be taken as relating to the fact that at the date of patent an appeal by defendant in error was pending in the Department and as meaning that such appeal was, by mistake, overlooked, this would not entitle the plaintiff below to maintain this suit, for upon consideration of such appeal, the decision might be the same.

I.

NO EQUITABLE TITLE TO SUSTAIN THE SUIT.

The plaintiff in error, defendant below, is the owner of the legal title by mesne conveyance from the United States, the original proprietor. January 23, 1885, the United States patented the premises to the State (11th Finding; Transcript, p. 29), and January 25, 1891 (19th Finding; Transcript, p. 30), the State conveyed the same to the plaintiff in error.

To defeat this legal title, the defendant in error, plaintiff below, relies upon what is supposed to be an equitable title founded upon certain requirements performed and proceedings thereon taken by him, by way of initiating a claim to the premises under the homestead laws of the United States. These acts and proceedings were as follows:

(1) *Requirements performed.* The steps taken by the claimant, in this connection, were: (a) Settlement upon the land, May 26, 1883 (2d Finding, Tr., p. 28); (b) residence thereon from date of such settlement to date of trial, and cultivation and improvement of the land during that period (3d Finding, Tr., p. 28); (c) erection, at date of settlement, of a substantial dwelling-house, which was burned and replaced by another in 1886 (12th Finding

Tr., p. 29); (*d*) cultivation of about five acres of the land (13th Finding, Tr., p. 29).

(2) *Proceedings taken.* The steps taken to assert the claim were as follows: (*a*) July 2, 1883, after the survey of the land, an informal application to make entry, not in writing and with no tender of fees, abandoned because of certain information given him by the local officers relative to supposed irregularity of the survey (5th Finding, Tr., p. 28); (*b*) August 5, 1884, formal application to make entry, with tender of fees, which application was rejected by the local officers on the ground, among others, that the premises inured to the State under the swamp-land grant (7th and 8th Findings, Tr., pp. 28, 29); (*c*) August 6, 1884, affidavits of contest against claim of State filed by claimant in the local office (9th Finding, Tr., p. 29); (*d*) August 26, 1884, an appeal by claimant to the Commissioner of the General Land Office from the decision of the local officers rejecting application to enter (10th Finding, Tr., p. 29).

It will be observed from the above that the defendant in error has, at no time, ever received from the United States any recognition whatever of his asserted claim; that so far as the United States is concerned, it has never done any act admitting the privity of the claimant, and that upon the contrary it has, so far as such claim was asserted, denied its validity by the rejection of the application to enter, and has, by patent, otherwise disposed of the land. It will further be observed that the defendant in error, to support his claim of equitable title, has shown nothing more than a mere compliance, without the assent of the United States, with certain of the conditions precedent to the allowance of a final homestead entry.

The Homestead laws of the United States require: (a) an original homestead entry, so called, to be allowed upon certain preliminary affidavits and proofs; (b) a settlement, residence upon and improvement of the claim for a certain period; (c) at the expiration of such period, proof, according to certain prescribed forms, of compliance with all the requirements of the statute. This ultimate showing is technically called "final proof," and upon such showing only, a final certificate, conferring a vested right to a patent, is issued.

Revised Statutes, secs. 2289, 2290, 2291.

Act of March 3, 1891, 26 Stat. 1095.

The provision as to final proof and entry is found in section 2291 of the Revised Statutes, unchanged in any way by the act of March 3, 1891, and is as follows:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in the case of her death, his heirs or devisee; or in the case of a widow making such entry, her heirs or devisee, in case of her death, proves by two creditable witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they, will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

The defendant in error has never made or offered to make the final proof required by this statute. Categori-

cally stated, he has never proved to the Land Department, or offered to prove, by two credible witnesses, or otherwise, that he had resided upon or cultivated the land for five years succeeding his original affidavit, nor has he ever made or offered to make, in the Land Department, or elsewhere, any affidavit that no part of the land had been alienated except as provided in section 2288 of the Revised Statutes. In other words, as shown by the record in the case at bar: (a) he has never proved or offered to prove in the Land Department the residence and cultivation required by law; (b) he has never made or offered to make, either in the Land Department or in the proceeding at bar, the affidavit of non-alienation also required by the statute; (c) he has not, even in the case at bar, shown that, as a matter of fact, he has not alienated the land in violation of the statute.

These questions (residence, cultivation, non-alienation) are all for the Land Department to decide; questions particularly submitted to its special jurisdiction by law, and in respect to which, as findings of fact, its decisions are conclusive even upon the court. Until these questions have been submitted to the Department by a claimant, or at least until he has offered to so submit them and been improperly refused recognition in that regard, such a claimant has certainly no legal or equitable right which he can set up as against the holder of the legal title issued in the meanwhile by the Government.

Suppose the patent to the State had never issued, and the defendant in error should now tender to the United States the final proof required. *Non constat*, that the same would be accepted as sufficient or that final entry would result. Indeed, that proof would, necessarily, upon the showing made in the case at bar, be rejected, for there is here an entire absence of all evidence of non-alienation.

There was but one way by which the defendant in error could have established a legal right, title, or claim to a patent, viz., by proving to the satisfaction of the Land Department, in the manner pointed out by the statute, that all the requirements of the law had been performed. This was not done. This being so, no equitable title entitled to recognition in this court could possibly arise except upon a showing that tender of proof of these requirements was made and consideration thereof denied by reason of the patent, or otherwise. This has not been done as to any of the requirements above particularly mentioned, and as to one, non-alienation, there is absolutely no proof, or even allegation, that alienation has not actually occurred.

The contention of the defendant in error thus resolves itself into the proposition that he is entitled to the judgment or decree of this court declaring him to be the sole and absolute owner of the premises in question, notwithstanding the fact that the United States has never, in any manner, recognized his claim, or that he held in any way in privity with it; the further fact that he has never proved to the United States, or offered to so prove, the ultimate facts upon which alone his claim could be recognized; and the still further fact that he has not proved or alleged all of such essential facts even in the case at bar. In other words, this court is asked to decree title, as against a patent, in one who has never established, or offered to establish, a valid claim before the Land Department and who does not, even in the case at bar, prove the facts which, if submitted to the Department, would show a valid claim.

We submit, with great confidence, that this contention is not well founded and that an equitable title cannot be thus established to overthrow the legal title evidenced by the patent.

The fact that the land was patented during the period when final proof could have been made on the homestead claim, does not relieve the defendant in error from the operation of the doctrine we above invoke. Before he can invoke the equitable remedy, he must bring himself technically into the position of legal privity in interest. He must, at the least, here establish such a state of fact as would entitle him to a patent, providing the patent to the State was out of the way. And this he has not done.

In a suit of this character, it was incumbent upon the defendant in error, the complainant below, to establish such a state of fact as would have justified the court in holding that *he himself* was entitled to a patent for the premises. It would not have been sufficient for him to have shown illegality or defect in the title of the patentee.

He was required to go further than that and establish a good claim or title in himself; otherwise he had no standing in court. To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received a patent. It must further appear that, by the law properly administered, the legal title should have been awarded to the complainant.

Bowhall *v.* Dilla, 114 U. S. 47, 50.

Sparks *v.* Pierce, 115 *ib.* 408, 412.

Lee *v.* Johnson, 116 *ib.* 48, 50

An equitable title, to sustain a suit like that at bar, must be founded upon some privity between the plaintiff and the original fee-simple owner. Such privity, if not necessarily the result of executed contract, certainly cannot arise without the assent and concurrence, express or implied, of the fee-simple owner. The defendant in error

has not, under the circumstances stated in the findings, established any such privity with the original source of title, and has, therefore, no standing as an equitable owner and is not entitled to maintain this suit.

Cooper v. Roberts, 18 How. 173.

Spencer v. Lapsley, 20 How. 264.

The Yosemite Valley Case, 15 Wall. 77.

Ehrhardt v. Hogaboom, 115 U. S. 67.

Cornelius v. Kessel, 128 U. S. 456.

Hartmann v. Warren, 76 Fed. Rep. 157.

To avoid this contention upon our part, counsel for defendant in error appear to rely almost entirely upon—
Ard v. Brandon, 156 U. S. 537.

This case, however, although in some respects similar to that at bar, is still clearly to be distinguished therefrom in several respects, and particularly and conclusively by the fact that Ard, the settler claiming against the conveyance of the United States, fully complied with all the requirements of law *by tendering the final proof required by the statute*, this fact being particularly set forth in the statement of the case (p. 540) as follows:

“In 1872 he made formal application to prove up on the land, but his application was denied by the local land officers. From this denial he prosecuted an appeal to the Commissioner of the General Land Office, and thence to the Secretary of the Interior, by both of whom the decision of the local land officers was affirmed.”

In the case then before the court the claimant not only fully established all the facts showing him to be entitled, but also that he had offered to prove all those facts to the Land Department and had been refused recognition.

In the case at bar no such proof or offer to the Department is shown. The distinction is obvious.

II.

THE PATENT, IF ISSUED UNDER THE SWAMP ACT, WAS AN
ADJUDICATION OF FACT.

The patent was issued to the State of Minnesota January 23, 1885 (11th Finding, Transcript, p. 29). The finding of fact relating to this matter does not determine whether said patent was issued for lands enuring to the State under the swamp-land grant or otherwise. Assuming, however, as will doubtless be claimed by our opponents, that the patent was so issued, and that it is to be so taken in the case at bar, we then submit that the issue of such patent by the Land Department is of itself an adjudication of the fact that the lands in question are swamp and overflowed, and that such finding of fact is not open to be reviewed by the courts in this proceeding. Whether said lands were swamp or not was a question of fact to be determined by the Land Department, and, assuming that the lands were patented to the State as swamp, the issue of said patent involved the determination by the proper officers of the Land Department that the lands were, as matter of fact, of the class which enured to the State under the grant of 1860. The decision of that question of fact was within the exclusive jurisdiction of the Land Department and cannot be impeached or reviewed by the court.

Johnson v. Towsley, 13 Wall. 72.

Warren v. Van Brunt, 19 Wall. 646.

Shepley v. Cowan, 91 U. S. 330.

French v. Fyan, 93 U. S. 169.

- Moore v. Robbins*, 96 U. S. 530.
Marquez v. Frisbie, 101 U. S. 473.
Vance v. Burbank, 101 U. S. 514.
Quinby v. Conlan, 104 U. S. 420.
Smelting Co. v. Kemp, 104 U. S. 636.
Steele v. Smelting Co., 106 U. S. 447.
Baldwin v. Stark, 107 U. S. 463.
United States v. Minor, 114 U. S. 233.
Ehrhardt v. Hogaboom, 115 U. S. 67.
Lee v. Johnson, 116 U. S. 48.
Wright v. Roseberry, 121 U. S. 488.
Cragin v. Powell, 128 U. S. 691.
Knight v. Land Assn., 142 U. S. 161.
United States v. Cal. & Ore. Land Co., 148 U. S. 31.
Barden v. N. P. R.R. Co., 154 U. S. 288.
Bishop of Nesqually v. Gibbon, 158 U. S. 155.
Atty. Genl. Miller, 19 Op. 684.

If, therefore, the patent is to be considered as one under the act of 1860, the fact that the land in controversy is swamp and overflowed, and, therefore, belongs to the State, is to be here taken as conclusively established. In this view of the case, the finding of the trial court (14th Finding ; Transcript, p. 29) that the land is not swamp or overflowed, is immaterial in the disposition of the case. If the lands were in fact swamp lands and were patented to the State as such, the patent was properly issued and defendant in error has no ground for complaint. If, on the other hand, the lands were not swamp, it was the province of the Land Department to so decide and is not the province of the court. In this connection it will be noted that there is no finding in the case that the lands were determined not to be swamp by the Land Department.

III.

UNDER THE FINDINGS, PATENT NOT NECESSARILY UNDER
SWAMP ACT.

As hereinbefore stated, the finding of the trial court in respect to the issue of the patent does not determine how or under what particular statute such patent was issued. So far as anything appears in this finding, the patent may have been issued under any other provision of law authorizing the patenting of land to the State of Minnesota. If the Land Department issued such patent under any authority other than the swamp-land act, the finding that the patent was made by mistake and inadvertence was clearly immaterial, so far as the rights of this respondent are concerned. If the lands were not swamp lands, and were patented to the State under some law other than the swamp act, the defendant in error cannot complain. And in the absence of a finding that the lands were patented to the State as swamp lands, the court will not conclude or presume that the Land Department committed an error in the issue of such patent.

IV.

THE FINDING OF MISTAKE AND INADVERTENCE TOO GENERAL.

The finding of fact relative to the issue of the patent declares that such patent was issued "through mistake and inadvertence." Whether the word "mistake" as here used, means mistake of fact, or mistake of law, does not appear. If it be a mistake of fact, this court cannot, as we have already seen, inquire into it and the finding becomes immaterial. If a mistake of law, the finding is

too general to be considered. The defendant in error, in his pleadings, does not claim any such mistake. If, however, such a position be taken upon the argument of the case, we then submit that in order to take advantage of a mistake of law, in the disposition of the land by the Land Department, it must be made to appear by the findings wherein such mistake consists and what statute is misconstrued or violated. In other words, the particular mistake must be pointed out and designated by the finding of the court, in order that it may appear whether what is claimed to be a mistake in the construction of law is really such.

Johnson *v.* Towsley, 13 Wall. 72.

Marquez *v.* Frisbie, 101 U. S. 473.

Quinby *v.* Conlan, 104 U. S. 420.

The use of the word "inadvertence" in this finding may possibly have reference to the further fact, stated in the 10th and 11th findings, that at the date of such patent the appeal of the defendant in error to the Commissioner of the General Land Office was pending and undetermined in said office. Such inadvertence, even if it be considered as established, does not assist the defendant in error. It would not in any way involve fraud nor, necessarily, any mistake of law, or even of fact. It would be simply clerical oversight on the part of the Department, and it would not follow that upon consideration of such appeal, the ultimate action of the Department would be in any wise different from what actually was done. *Non constat* the Department would not have decided, upon the appeal, that the land was swamp.

V.

IF APPEAL HAD BEEN CONSIDERED, RESULT MIGHT HAVE BEEN THE SAME.

If, while the appeal of the defendant in error was pending and undetermined in the Land Department, such appeal was overlooked by mistake and a patent was thus inadvertently issued, that fact does not entitle the plaintiff in error to the relief attempted to be given by the court below. No mistake either of law or fact was involved, and no fraud being charged, the mistake was a mere clerical oversight. The position of the defendant in error is that the Commissioner has not acted upon his appeal, and is deprived of jurisdiction to act by reason of the patent. Concede this position for the sake of the argument, and it does not then follow that if the Commissioner's jurisdiction to act were restored, the act of issuing the patent would be changed. The question as to the character of the land would still be one within the jurisdiction of the Commissioner, and it might be decided, upon the second hearing, precisely as it was necessarily decided upon by the issue of the patent. In other words, the claim here made in respect to mistake and inadvertence in the issue of the patent, even if conceded, does not entitle the defendant in error to the relief which he has obtained in the court below, namely, a judgment declaring him to be possessed of the sole and exclusive title to the premises in controversy.

VI.

Upon the foregoing considerations, it is respectfully submitted that the judgment of the Supreme Court of the

State of Minnesota should be reversed and the cause remanded with directions to enter judgment for the plaintiff in error, the Duluth and Iron Range Railroad Company.

Respectfully submitted.

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DAVIS, HOLLISTER AND HICKS,
of Counsel.